

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and Senate at the conference on the disagreeing vote of the two Houses on the amendment of the Senate to the bill (H.R. 775), to establish certain procedures for civil actions brought for damages relating to the failure of any device or system to process or otherwise deal with the transition from the year 1999 to the year 2000, and for other purposes, submit the following joint statement to the House and Senate in explanation of the effects of the action agreed upon by the managers and recommended in the accompanying report.

The House recedes from its disagreement to the amendment of the Senate with an amendment that is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

DEFINITION OF Y2K ACTION

The House and Senate versions had different definitions of Y2K action. The conferees agreed to a definition that makes the intended scope of the Act clear. The modified definition includes actions that involve both actual and potential failures that could occur or cause harm before January 1, 2003. The conferees want to ensure that the Act applies to those cases involving questions such as the determination of liability to shareholders or responsibility for the costs of remediation even when there is no actual Y2K failure. Additionally, the conferees note that there have already been many cases filed involving Y2K issues in which there has been no actual failure but only potential, prospective, or anticipated failures. The conferees intend to include these types of cases within the scope of the Act.

FINANCIAL INSTITUTIONS

The Senate amendment to H.R. 775 contained an amendment by Senator Inhofe, incorporating language proposed by Senator Hollings, to ensure that a homeowner cannot be foreclosed upon due to a Y2K failure. The conferees agree that the actual language adopted was broader than the intent stated by Senator Hollings, and after consultation with the Federal Deposit Insurance Corporation, and the House Committee on Banking and Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs, the conferees have agreed to modify section 4(h) of the Senate amendment. It is the conferees' intent that the section, as modified, will provide the protections proposed by Senator Hollings without affecting all financial transactions,

including those which do not involve either a consumer/homeowner or an actual Y2K failure. The modified language limits the applicability of the protections to residential mortgages. It requires the consumer to provide notice of the Y2K failure and of the consumer's inability to timely fulfill his or her obligation to pay. The modified language also limits the applicability of this subsection to transactions occurring between December 16, 1999, and March 15, 2000.

OTHER MATTERS

The conferees agree that while other differences exist between the House bill and the Senate amendment, many of these differences do not reflect a difference in intent. For example, the House bill contained a definition of ``damages" while the Senate amendment does not. The conference substitute does not include a definition of ``damages" because the conferees agree that the House definition is self-evident in actual practice and under State law, so that the definition is unnecessary.

Application of Act

The conferees agreed to add language to section 4, relating to the scope of application of the Act, to make it clear that in any Y2K action that arises under the securities laws, the provisions of the Act (other than section 13(b)) do not apply.

Y2K Upset Protections

The conference substitute includes the Inhofe amendment with modifications. The purpose of the Inhofe amendment is to waive penalties for limited, exceptional and temporary noncompliance with federally enforceable measurement, monitoring, or reporting requirements, for which there was otherwise no violation of the underlying substantive federally enforceable regulation. For example, in the environmental arena, because of a Y2K failure, a facility's monitoring or reporting equipment fails to operate properly; the facility continues to function normally and all applicable pollution standards or limits are otherwise met. In that situation, the facility would get the benefit of the waiver provided it met the conditions set forth under this section. However, if, aside from the monitoring or reporting requirements, the facility has violated the underlying federally enforceable requirement to which the monitoring or reporting requirement related, or if there was actual or imminent harm to the public health, safety, or the environment, the facility would not get the benefit of the defense.

The phrase ``measurement, monitoring, or reporting" broadly covers a range of federal requirements, but not every term need apply to every federal program. For example, the term ``measurement" is not intended to apply to federal environmental statutes.

Proportionate Liability

Prior to the conference, the House version of the Proportionate Liability section

provided that a defendant would only be responsible for that portion of a Y2K claim that corresponds to the defendant's percentage of responsibility for the harm experienced by the plaintiff. This provision would supersede existing laws imposing joint and several liability on defendants. The Senate amendment was substantially similar in the scope of the general rule but added several exceptions to it. The conference substitute incorporates a number of modifications, as follows:

Under the original Senate formulation, in most circumstances, a defendant would only be proportionately liable for the damages for which the defendant was responsible. The proportion of responsibility would be based as a "percentage of the total fault of all persons, including the plaintiff, who caused or contributed to the total loss incurred by the plaintiff." If alleged by the plaintiff, the fact-finder would also have to make a determination of whether the defendant "acted with specific intent to injure the plaintiff" or knowingly committed fraud. If the fact-finder answers either of those two questions in the affirmative, then that individual defendant will remain jointly and severally liable for the plaintiff's damages. Subsection (c)(2)(A) defines the circumstance under which a defendant commits knowing fraud for purposes of this section. Subsection (c)(2)(B) makes clear that simply reckless conduct by the defendant is not enough to trigger the knowing fraud definition of this section.

The other two exceptions to proportional liability contained within the original Senate amendment deal with what happens when there is an uncollectible share of liability. The original formulation of the uncollectible share exception provided that a defendant would be liable for an uncollectible share in proportion to that defendant's total responsibility but the defendant's total liability for the uncollectible share could not exceed 50 percent of that defendant's proportionate share. The second exception deals with when there is an uncollectible share and "the plaintiff is an individual whose recoverable damages under the final judgment are equal to more than 10 percent of the net worth of the plaintiff" and the plaintiff's overall net worth is less than \$200,000. In the second case, all other defendants remain entirely jointly and severally liable for the uncollectible share.

The additional amendment proposed by the Senate and agreed to by the House conferees modifies the general rule for uncollectible shares. Under this amendment, a defendant would be liable for an additional 100 percent of its proportionate share as applied to the uncollectible share, rather than being liable for only up to 50 percent of the defendant's proportionate share. In addition, the amendment holds a defendant liable for an additional 50 percent of that defendant's proportionate share of the uncollectible amounts if that defendant acted with reckless disregard for the likelihood that the defendant's acts would cause the harm or loss suffered by the plaintiff. The amendment also permits certain plaintiffs who are individual consumers and who bring individual suits, rather than class actions, to hold other defendants liable for uncollectible shares consistent with state law.

The original Senate amendment also contains provisions dealing with settlement

discharge and a defendant's right to contribution from fellow defendants. Subsection (e) indicates that a defendant may settle a Y2K action at any time before a final verdict or judgment is reached and such a defendant will be discharged from all contribution claims brought by other persons. The amendment also makes clear that a defendant who, because of the exceptions contained in the amendment, becomes jointly and severally liable for a portion of the plaintiff's damages, may recover contribution from any other person who would have been liable for the plaintiff's damages. The determination of a claim for contribution must be based on the percentage of responsibility of the defendant ``against whom a claim for contribution is made."

The conference agreement makes clear that State laws are not preempted. This section does not preempt State statutes that limit a defendant's liability to a lesser amount than that determined under this section or otherwise provide greater protection to a defendant from joint and several liability.

The general intent behind this section is to impose proportional liability upon a defendant rather than joint and several liability. The conferees are of the view, except for limited exceptions, that it is inherently unfair to hold a defendant that has limited culpability liable for the entire amount of the judgment obtained by the plaintiff. This section does not allow defendants to transfer the amount of their responsibility to other parties. Rather, this section recognizes and holds defendants liable for the actual amount of harm they actually caused, and for orphan shares of individual consumers.

The original exceptions contained in the Senate amendment as well as the subsequent Senate amendment agreed to by the House conferees, provides a limited escape route for plaintiffs that could be grossly disadvantaged by a pure formulation of proportional liability. These exceptions only apply in the context of when the defendant engaged in especially egregious conduct or when the damages awarded to the plaintiff may not be entirely recoverable due to a defendant's insolvency or other problem in paying.

Duty to Mitigate

Prior to the conference, the House version of the Duty to Mitigate section stated the duty of plaintiffs to avoid damages which ``could reasonably have been avoided in light of any disclosure or other information" including information made available by the defendant. The Senate Amendment was substantially identical except for its reference to ``Y2K action" rather than the House version's ``Y2K claim." The House conferees agreed to recede to the Senate formulation. The Senate proposed an additional amendment that was agreed to by the House.

The additional amendment kept the Senate formulation substantially intact but added 2 new subsections. Subsection (b) includes the plaintiff's duty to mitigate but makes clear that the Federal mitigation requirement is in addition to any State mitigation requirement. Subsection (c) provides an exception to the plaintiff's affirmative duty to mitigate where the plaintiff has relied on the defendant's fraudulent representations

regarding the Y2K readiness of the product that is the basis of the plaintiff's suit.

This provision is intended to further this legislation's fundamental goal of Y2K remediation. This section affirms State law that requires plaintiffs to take reasonable steps to limit their damages. The amendments agreed to by the conferees provide that in limited circumstances where the defendants are engaged in egregious conduct, a plaintiff will be relieved of this affirmative duty.

Section 9 affirms, at the Federal level, the Uniform Commercial Code provisions addressing the responsibility of plaintiffs to limit their damages by obtaining other conforming goods (UCC § 2-712, duty to "cover") and limitations on a buyer's consequential damages to those which could not have "reasonably" been prevented. These concepts establish an independent affirmative responsibility on buyers. The basis for this responsibility to avoid "losses that reasonably could have been prevented" arises without reference to any action by the seller/defendant. Section 9, as amended by the conferees, recognizes the unprecedented risk attaching to Y2K and accordingly adds to these established Uniform Commercial Code principles in one significant way. The section extends the concept of mitigation to events occurring prior to the actual tort or contractual breach.

Economic Loss

Both the House and Senate bills included language to codify the economic loss rule. That rule States that a party who has suffered only economic damages must generally sue to recover those damages under contract, not tort, law. The House version, however, excepted all intentional torts from the scope of the rule while the Senate version did not expressly address intentional torts. The Senate and House agree to an amendment that clarifies this exception to the economic loss rule. Under the conference substitute, the economic loss rule applies to all torts except intentional torts arising independent of a contract. This codifies the rapidly emerging trend in State law to apply the economic loss rule to bar intentional tort claims, such as fraud claims, where such claims are intrinsic to, or indistinguishable from, an underlying contractual dispute between the parties. Simply put, breach of contract, intentional or otherwise, does not generally give rise to a tort claim; it is simply breach of contract. If, however, there is an intentional tort that is extraneous to the underlying contract claim, this section will not limit a party's ability to recover economic losses under applicable law.

Warranty and Contract Preservation

The intent of section 4(d) of the conference substitute is to enhance business certainty and discourage frivolous lawsuits that attempt to undermine established contractual relationships. This section makes clear that contract terms and provisions shall be fully enforced so contracting entities have the benefit of their bargains. The mere fact that a Y2K-related problem arises should not cause courts to disregard or diminish enforceable contract terms unless those terms are directly contrary to a specific statute.

Thus, exclusions of liability, disclaimers of warranty and similar limitations will be recognized and enforced as written. The conferees, however, agreed to an amendment that clarifies that this section does not make enforceable contract terms that are otherwise unenforceable under State law doctrines of unconscionability, including adhesion, recognized as of January 1, 1999 under controlling judicial precedent.

Application of IRDA

The conferees agreed to an amendment to section 13 of the Senate amendment to make it clear that the protection for exchanges of information provided by the Year 2000 Information and Readiness Disclosure Act apply to Y2K actions under the Act.

Technical Change to Section 16 (the Allard Amendment)

The conference substitute contains a technical change to section 16 which will prevent any potential misinterpretation of this section. The intent of section 16, which is the text of an amendment offered to S. 96 by Senator Allard, is to clarify that nothing in this Act will preempt or prevent the applicability of any State law which imposes more restrictive limits on damages and liabilities than the limits provided for in this Act. The original wording, ``greater limits," left room for confusion and possible misinterpretation by providing an opportunity for argument that any State law with higher limits on damages and liabilities would supersede this Act. Because this Act supersedes any State law which allows a plaintiff to pursue or collect any amount in damages or liabilities which are above and beyond the amounts provided for in this Act, the conferees want to clarify the wording of this section. The new wording, ``stricter limits," coupled with the language ``affording greater protection to defendants in Y2K actions" than would be afforded under the Act, ensures that this Act grants deference only to State laws which cap damages and liabilities at a lower amount than provided for in this Act.